



January 8, 2004

U.S. ENVIRONMENTAL PROTECTION AGENCY

U.S. DEPARTMENT OF JUSTICE

MEMORANDUM

SUBJECT: Issuance of "Revised Model CERCLA Section 122(h)(1) Agreement for Peripheral Party Settlements Not Based on Ability to Pay" and "Revised Model CERCLA Section 122(h)(1) Agreement for Peripheral Party Settlements Based on Ability to Pay"

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TO: Director, Office of Site Remediation and Restoration, Region I
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Director, Hazardous Site Cleanup Division, Region III
Director, Waste Management Division, Region IV
Directors, Superfund Division, Regions V, VI, VII and IX
Assistant Regional Administrator, Office of Ecosystems Protection and
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Assistant Regional Administrator, Office of Enforcement, Compliance, and Environmental Justice,
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Assistant Section Chiefs, Environmental Enforcement Section, U.S.
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Chief, Assistant Chiefs, Environmental Defense Section, U.S. Department of Justice

We are pleased to issue the "Revised Model CERCLA Section 122(h)(1) Agreement for Peripheral Party Settlements Not Based on Ability to Pay" and "Revised Model CERCLA Section 122(h)(1) Agreement for Peripheral Party Settlements Based on Ability to Pay." These administrative cashout models supersede Appendices B and C of the September 30, 1998 "Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority" ("Section 122(h) Guidance").

The revised models have been updated to conform more closely with the judicial peripheral party models (“Model CERCLA Peripheral Party Cashout Consent Decree” and “Model CERCLA ATP Peripheral Party Cashout Consent Decree”) issued on July 11, 2001, and other more-recently issued CERCLA models, including the “Revised Model CERCLA Section 122(h)(1) Agreement for Recovery of Past Response Costs” (Feb. 6, 2003) (which superseded Appendix A of the Section 122(h) Guidance), and the “Revised Model Administrative Order on Consent for Removal Actions” (July 9, 2001). The revisions include:

- 1) updated definition of Interest;
- 2) updated special account creation language;
- 3) optional language for establishing an interest-bearing escrow account for settlor’s payment pending final approval of the settlement;
- 4) revised non-exempt de micromis party waiver for use at settlements at non-NPL sites;
- 5) optional access to information language;
- 6) making optional the retention of records section;
- 7) updated covenant not to sue by settling parties language;
- 8) updated certification language (and addition of disclosure of applicable insurance policies to the ATP model); and
- 9) model language (in the non-ATP model) for settlements that include Federal PRPs as peripheral parties.

These revised models are designed for use by EPA and DOJ staff when negotiating CERCLA administrative cashout agreements with peripheral parties. We encourage our staffs to conform to the language of these two models, subject to modifications needed based upon site-specific circumstances. Further guidance on peripheral party cashouts is contained in Part II(B)(3) of the Section 122(h) Guidance.

Please address any questions on these models to Janice Linett of the Regional Support Division at (202) 564-5131 or Leslie Allen of the Environmental Enforcement Section at (202) 514-4114.

Attachments

cc: Scott Sherman, Associate General Counsel for Solid Waste and Emergency Response
Juliette McNeil, Director, Financial Management Division
Office of Regional Counsel Branch Chiefs, Regions I-X
CERCLA Settlement Lead Region Workgroup

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED
STATES DEPARTMENT OF JUSTICE REVISED MODEL CERCLA SECTION
122(h)(1) CASHOUT AGREEMENT FOR PERIPHERAL PARTY SETTLEMENTS
NOT BASED UPON ABILITY TO PAY**

January 8, 2004

[NOTE: This revised model supersedes the “Model CERCLA Section 122(h)(1) Cashout Agreement for Peripheral Party Settlements Not Based on Ability to Pay” that was issued as Appendix C to the September 30, 1998 “Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority.”]

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and U.S. Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.

**REVISED MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT
FOR PERIPHERAL PARTY SETTLEMENTS NOT BASED UPON ABILITY TO PAY**

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**REVISED MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT
FOR PERIPHERAL PARTY SETTLEMENTS NOT BASED UPON ABILITY TO PAY**

IN THE MATTER OF:	)	AGREEMENT
)	
Site Name]	)	U.S. EPA Region ____
[City, County, State]	)	CERCLA Docket No. ____
)	
[Names of Settling Parties]	)	PROCEEDING UNDER SECTION
SETTLING PARTIES	)	122(h)(1) OF CERCLA
_____	)	42 U.S.C. §9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D and redelegated to [insert reference to any Regional redelegation]. This Agreement is also entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States, which authority, in the circumstances of this settlement, has been delegated to [check with DOJ contact to determine appropriate DOJ official].

2. This Agreement is made and entered into by EPA [,] [and] [insert names or reference attached appendix listing settling parties] (“Settling Parties”)[, and insert names or reference attached appendix listing settling federal agencies (“Settling Federal Agencies”)]. Each Settling Party consents to and will not contest the authority of the United States [if Settling Federal Agencies, insert, “, and each Settling Federal Agency consents to and will not contest the authority of EPA,”] to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the [insert Site name] (“Site”) located in [insert Site location]. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and [will/may] undertake additional response actions in the future. **[NOTE: A brief description of the release or threatened release and of the response actions taken or to be taken by EPA or potentially responsible parties may be included.]**

5. In performing response action at the Site, EPA has incurred response costs and will incur additional response costs in the future.

6. EPA alleges that Settling Parties [if Setting Federal Agencies, insert, “and Settling Federal Agencies”] are responsible parties pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and are jointly and severally liable for response costs incurred and to be incurred at the Site.

7. EPA and Settling Parties [if Setting Federal Agencies, insert, “and Settling Federal Agencies”] recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Parties [and Settling Federal Agencies] in accordance with this Agreement do not constitute an admission of any liability by any Settling Party [or any Settling Federal Agency]. Settling Parties [and Settling Federal Agencies] do not admit, and retain the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in this Section.

III. PARTIES BOUND

8. This Agreement shall be binding upon EPA [if Setting Federal Agencies, insert, “and Settling Federal Agencies”] and upon Settling Parties and their [heirs,] successors and assigns. Any change in ownership or corporate or other legal status of a Settling Party, including but not limited to any transfer of assets or real or personal property, shall in no way alter such Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. STATEMENT OF PURPOSE

[EXPLANATORY NOTE ON SETTLEMENT OPTIONS UNDER THIS MODEL: In exchange for the covenant not to sue provided in Section VIII of this Agreement, peripheral party cashout settlements should address the risk of cost overruns during performance of response action at the Site through one of three means:

1) payment of an up-front premium;

2) agreement to pay a percentage of actual future costs upon receipt of one or more future bills if total response costs exceed the estimate upon which Settling Parties' payment is based, as shown in the Payment of Additional Response Costs provision in the Appendix to this model; or

3) inclusion of the cost overrun reservation of rights shown in Subparagraph 20(f) below, which preserves EPA's ability to seek additional response costs or performance of response

action from Settling Parties if total response costs at the Site exceed the estimate upon which Settling Parties' payment is based.]

9. By entering into this Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing Settling Parties [if Settling Federal Agencies, insert, "and Settling Federal Agencies"] to make a cash payment [, which includes a premium,] to resolve their alleged civil liability under Sections 106 and 107 of CERCLA, 42 U.S.C. §§ 9606 and 9607 [, and under Section 7003 of RCRA, 42 U.S.C. § 6973], with regard to the Site as provided in the Covenant Not to Sue by EPA in Section VIII [if Settling Federal Agencies, delete "Not to Sue"], subject to the Reservations of Rights by EPA in Section IX [if Settling Federal Agencies, insert, "], and as provided in the Covenant Not to Sue by Settling Parties in Section X"].

V. DEFINITIONS

10. Unless otherwise expressly provided herein, terms used in this Agreement that are defined in CERCLA or in regulations promulgated under CERCLA shall have the meanings assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. "Agreement" shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. "CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. "Day" shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. "EPA" shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

e. "Interest" shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.¹

¹ The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at http://www.epa.gov/budget/finstatement/superfund/int_rate.htm.

[NOTE: Insert the following definition if the optional Site Access provision is used.] [___]. “Owner Settling Parties” shall mean [insert names of Settling Parties who are Site owners.]

f. “Paragraph” shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

g. “Parties” shall mean EPA [, and] Settling Parties[, and Settling Federal Agencies.].

h. “RCRA” shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. § 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

i. “Section” shall mean a portion of this Agreement identified by a Roman numeral.

[If Settling Federal Agencies, insert the following definition.] [___]. “Settling Federal Agencies” shall mean [insert names of settling federal agencies, or if numerous, “those departments, agencies, and instrumentalities of the United States identified in Appendix ___.”]

j. “Settling Parties” shall mean [insert names of settling non-federal parties, or if numerous, “those parties identified in Appendix ___.”]

k. “Site” shall mean the _____ Superfund site, encompassing approximately _____ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either “generally shown on the map included in Appendix ___” or “generally designated by the following property description: _____.”]

l. “United States” shall mean the United States of America, including its departments, agencies, and instrumentalities.

VI. PAYMENT OF RESPONSE COSTS

11. Within 30 days after the effective date of this Agreement as defined by Paragraph 32, Settling Parties shall pay to the EPA Hazardous Substance Superfund \$_____, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment.

[NOTE: As an alternative to calculation and payment of interest from the Past Response Costs date through the date of payment, the following alternative Paragraph 11 may be used if Settling Parties agree to place the payment amount (plus accrued Interest from the Past Response Costs date through the date the escrow account is created) into an interest-bearing escrow account to be disbursed to EPA upon the effective date of the Agreement.]

[11. Within 5 business days after Settling Parties receive notice from EPA that this Agreement has been signed by EPA (if DOJ approval is needed, insert “and approved by the Attorney General or his/her designee”), Settling Parties shall deposit \$ _____ into an escrow account bearing interest on commercially reasonable terms, in a federally-chartered bank (the “Escrow Account”). If the Agreement is not made effective after public comment, the monies placed in escrow, together with accrued interest thereon, shall be returned to Settling Parties. If the Agreement is made effective after public comment, Settling Parties shall, within 15 days thereof, cause the monies in the Escrow Account to be paid to EPA in accordance with Paragraph 12 below.]

12. [NOTE: The following language should be used if the payment amount is above \$25,000. Regional attorneys should consult with the Comptroller’s Office in the Region to determine if more specific EFT instructions should be included.] Payment [if Settling Federal Agencies, insert “by Settling Parties”] shall be made to EPA by Electronic Funds Transfer (“EFT”) in accordance with current EFT procedures to be provided to Settling Parties by EPA Region __, and shall be accompanied by a statement identifying the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below \$25,000.]** Payments [if Settling Federal Agencies, insert “by Settling Parties”] shall be made by certified or cashier's check made payable to “EPA Hazardous Substance Superfund.” Each check, or a letter accompanying each check, shall identify the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

At the time of payment, each Settling Party shall also send notice that payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID # _____ and the EPA docket number for this action.

13. The total amount to be paid by Settling Parties pursuant to Paragraph 11 shall be deposited by EPA in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

[NOTE ON SPECIAL ACCOUNTS: Payments made under Paragraph 11 may be deposited in the Hazardous Substance Superfund or may be deposited in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as

a “reimbursable account”).² The Agreement should include clear instructions indicating which portion of the payment is to be deposited in the Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Under Paragraph 13 as written, 100% of the payment will be deposited in a special account. The following language may be substituted if all or part of the payment will be deposited in the EPA Hazardous Substance Superfund.]

[If the entire payment will be deposited by EPA in the EPA Hazardous Substance Superfund:]

“The total amount to be paid by Settling Parties pursuant to Paragraph 11 shall be deposited by EPA in the EPA Hazardous Substance Superfund.”

[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]

“Of the total amount to be paid by Settling Parties pursuant to Paragraph 11 of this Agreement, [‘\$ ____’ or ‘____%’] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [‘\$ ____’ or ‘____%’] shall be deposited by EPA in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

[If Settling Federal Agencies are making payments, insert the following paragraph.]

[13.1. As soon as reasonably practicable after the effective date of this Agreement[, and consistent with Paragraph 13.1(a)(iii),] the United States, on behalf of Settling Federal Agencies, shall:

[a](i). Pay to the EPA \$ ____, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment.

[a](ii). The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 13.1(a)(i) shall be deposited by EPA in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. **[Insert one of the following alternative instructions if part or all of the Settling Federal Agencies’ payment will be deposited in the EPA Hazardous Substance Superfund:]**

² When PRPs are performing the response action at the Site, payments may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account.

“The total amount to be paid by Settling Federal Agencies pursuant to Paragraph 13.1(a)(i) shall be deposited by EPA in the EPA Hazardous Substance Superfund.”

“Of the total amount to be paid by Settling Federal Agencies pursuant to Paragraph 13.1(a)(i), [‘\$ ____’ or ‘ ____%’] shall be deposited by EPA in the EPA Hazardous Substance Superfund and [‘\$ ____’ or ‘ ____%’] shall be deposited by EPA in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

[a](iii). If the payment to EPA required by this Paragraph 13.1(a)(i) is not made as soon as reasonably practicable, the appropriate EPA Regional Branch Chief may raise any issues relating to payment to the appropriate DOJ Assistant Section Chief for the Environmental Defense Section. In any event, if this payment is not made within 120 days after the effective date of this Agreement, EPA and DOJ have agreed to resolve the issue within 30 days in accordance with a letter agreement dated December 28, 1998.

[b.] Pay to the Settling Parties \$ _____, in reimbursement of Settling Parties’ past and future response costs at the Site, by ACH Electronic Funds Transfer in accordance with instructions provided by Settling Parties.

13.2. The Parties to this Agreement recognize and acknowledge that the payment obligations of Settling Federal Agencies under this Agreement can only be paid from appropriated funds legally available for such purpose. Nothing in this Agreement shall be interpreted or construed as a commitment or requirement that any Settling Federal Agency obligate or pay funds in contravention of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other applicable provision of law.]

[NOTE: If Settling Parties (or Settling Federal Agencies) have agreed to pay a percentage of actual future costs upon receipt of one or more future bills (option 2 of the Explanatory Note in Section IV), insert the Additional Response Costs language provided in the Appendix to this model.]

VII. FAILURE TO COMPLY WITH AGREEMENT

14. Interest on Late Payments. If any Settling Party fails to make any payment required by Paragraph 11 by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

15. Stipulated Penalty.

a. If any amounts due to EPA under Paragraph 11 are not paid by the required date, Settling Parties shall be in violation of this Agreement and shall pay to EPA, as a stipulated

penalty, in addition to the Interest required by Paragraph 14, \$_____ per violation per day that such payment is late.

[NOTE: If the Agreement includes any non-payment obligations for which a stipulated penalty is due, insert, “If Settling Parties do not comply with [reference sections containing non-payment obligations], Settling Parties shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, \$_____ per violation per day of such noncompliance.” Escalating penalty payment schedules may be used for payment or non-payment obligations.]

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall identify the name and address of the party(ies) making payment, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

c. At the time of each payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall identify the EPA Region and Site-Spill ID # _____ and the EPA Docket Number for this action.

d. Penalties shall accrue as provided above regardless of whether EPA has notified Settling Parties of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment obligations are included, insert “or performance”] is due [if non-payment obligations are included, insert “, or the day a violation occurs,”] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, “or the final day of correction of the noncompliance or completion of the activity.”] Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

16. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Parties’ failure to comply with the requirements of this Agreement, any Settling Party who fails or refuses to comply with any term or condition of this Agreement shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Agreement, Settling Parties shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

17. The obligations of Settling Parties to pay amounts owed to EPA under this Agreement are joint and several. In the event of the failure of any one or more Settling Parties to make the

payments required under this Agreement, the remaining Settling Parties shall be responsible for such payments.

18. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Settling Parties' payment of stipulated penalties shall not excuse Settling Parties from payment as required by Section VI or from performance of any other requirements of this Agreement.

VIII. COVENANT NOT TO SUE BY EPA

[NOTE: If Settling Federal Agencies are making payments, delete "Not to Sue" from the title of this Section.]

19. Covenant Not to Sue [if Settling Federal Agencies, insert, "Settling Parties"] by EPA. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Settling Parties pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. 6973,]³ with regard to the Site.⁴ With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all amounts required by Section VI (Payment of Response Costs) [if Payment of Additional Response Cost provision is used, reference only those paragraphs within Section VI that do not include Additional Response Costs] and any amount due under Section VII (Failure to Comply with Agreement). This covenant not to sue is conditioned upon the satisfactory performance by Settling Parties of their obligations under this Agreement. This covenant not to sue extends only to Settling Parties and does not extend to any other person.

[NOTE: If Settling Federal Agencies are making payments and qualify for peripheral party status at the Site, insert the following covenant. If they do not qualify for peripheral party status, the scope of the covenant will require case-specific discussion.]

[19.1. Covenant for Settling Federal Agencies by EPA. Except as specifically provided in Paragraph 20 (Reservation of Rights by EPA), EPA covenants not to take administrative action against Settling Federal Agencies pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,] with regard to the Site.⁵ With respect to present and future liability, this covenant shall take effect upon receipt by EPA of all payments required by Section VI (Payment of Response Costs) [if Payment of Additional Response Cost Provision is used, reference only those paragraphs within Section VI that do not

³ Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

⁴ This covenant assumes that EPA has decided to grant a full covenant not to sue for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed.

⁵ See n. 3 and 4 *supra*.

include Additional Response Costs]. This covenant is conditioned upon the satisfactory performance by Settling Federal Agencies of their obligations under this Consent Agreement. This covenant extends only to Settling Federal Agencies and does not extend to any other person.]

IX. RESERVATIONS OF RIGHTS BY EPA

20. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Parties [if Settling Federal Agencies, insert, “and Settling Federal Agencies”] with respect to all matters not expressly included within the Covenant Not to Sue [if Settling Federal Agencies, delete “Not to Sue”] by EPA in Paragraph 19 [if Settling Federal Agencies, insert “and the Covenant for Settling Federal Agencies by EPA in Paragraph 19.1.”]. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Parties [if Settling Federal Agencies, insert “and EPA reserves and this Agreement is without prejudice to, all rights against Settling Federal Agencies,”] with respect to:

a. liability for failure of Settling Parties [or Settling Federal Agencies] to meet a requirement of this Agreement;

b. criminal liability;

c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

[NOTE: The precise terms of Subparagraph (d) may need to be changed for any Settling Party who has a continuing relationship with the Site.] d. liability, based upon Settling Parties’ [or Settling Federal Agencies’] ownership or operation of the Site, or upon Settling Parties’ [or Settling Federal Agencies’] transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Agreement by Settling Parties [or Settling Federal Agencies]; [and]

e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site; [and]

[NOTE: Insert Subparagraph (f) if Settling Parties (or Settling Federal Agencies) have not agreed in Section VI (Reimbursement of Response Costs) to compensate EPA for the costs described in Subparagraph (f) through a premium payment or through an Additional Response Cost billing procedure as shown in the Appendix to this model.] [f. liability for performance of response action or for reimbursement of response costs if total response costs incurred or to be incurred at or in connection with the Site by the United States or any other person exceed \$_____ [insert total response cost estimate upon which Settling Parties’ payment is based].

21. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Agreement.

X. COVENANT NOT TO SUE BY SETTLING PARTIES

22. Settling Parties covenant not to sue and agree not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site⁶ or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claims arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; and

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.⁷

Except as provided in Paragraph 24 (Waiver of Claims) and Paragraph 27 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 20(c) - (f), but only to the extent that Settling Parties' claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

⁶ If the Agreement does not cover the Site as a whole, the reference to "the Site" here and in Subparagraphs 22(b) and (c) should be narrowed to conform to the intended scope of the Agreement.

⁷ The settlement should, wherever possible, release or resolve any claims by Settling Parties against the United States related to the Site. Where a claim is asserted by a potentially responsible party, or the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues in the settlement. Only in exceptional circumstances where federal liability cannot be resolved in a timely manner in the settlement should this provision be revised to allow private parties to reserve specifically delineated rights to seek contribution against the United States.

23. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

24. Settling Parties agree not to assert any claims or causes of action that they may have for all matters relating to the Site, including for contribution, against any other person. This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Party.

XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

25. Except as provided in Paragraph 24, nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

26. The Parties agree that Settling Parties [if Settling Federal Agencies, insert, “and Settling Federal Agencies”] are entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Agreement. The “matters addressed” in this Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or by any other person. The “matters addressed” in this Agreement do not include those response costs or response actions as to which EPA has reserved its rights under this Agreement (except for claims for failure to comply with this Agreement), in the event that EPA asserts rights against Settling Parties [or Settling Federal Agencies] coming within the scope of such reservations.⁸

27. In any subsequent administrative or judicial proceeding initiated by EPA, or the United States on behalf of EPA, for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Parties [and Settling Federal Agencies] shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by EPA, or the United States on behalf of EPA, in the subsequent proceeding were or should have been brought in the instant case; provided, however, that nothing in this Paragraph affects the

⁸ This definition of “matters addressed” assumes that this Agreement is designed to resolve fully Settling Parties’ [and Settling Federal Agencies’] liability at the Site pursuant to Sections 106 and 107(a) of CERCLA, subject only to the reservations of rights. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed.

enforceability of the Covenant Not to Sue by EPA [if Settling Federal Agencies, delete “Not to Sue”] set forth in Section VIII.

[___. SITE ACCESS]⁹

[___. Commencing upon the effective date of this Agreement, Owner Settling Parties agree to provide EPA and its representatives and contractors access at all reasonable times to the Site and to any other property owned or controlled by Owner Settling Parties to which access is determined by EPA to be required for the implementation of this Agreement, or for the purpose of conducting any response activity related to the Site, including but not limited to:

- a. Monitoring, investigation, removal, remedial or other activities at the Site;
- b. Verifying any data or information submitted to EPA;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing response actions at or near the Site; [and]
- [f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Parties or their agents, consistent with Section ____ (Access to Information).]

____. Notwithstanding any provision of this Agreement, EPA retain[s] all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.]

[___. ACCESS TO INFORMATION]¹⁰

⁹ Include this Section if 1) access to the Site may be needed and 2) the Site owner is a Settling Party or a Settling Party controls access to the Site or to any other property to which access is needed. If any of the Settling Parties will need to provide institutional controls as part of a response action, include such a provision here. Model language may be found in Section IX of the Revised Model RD/RA Consent Decree (June 12, 2001, or more recent update).

¹⁰ Include this Section only if Settling Parties have been or will be involved in cleanup efforts at the Site or if Settling Parties may possess information that may assist the Agency in its cleanup or enforcement efforts.

[__]. Settling Parties shall provide to EPA, upon request, copies of all records, reports, or information (hereinafter referred to as “records”) within their possession or control or that of their contractors or agents relating to activities at the Site [if needed, include “or to the implementation of this Agreement”], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

___. Confidential Business Information and Privileged Documents.

a. Settling Parties may assert business confidentiality claims covering part or all of the records submitted to EPA under this Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA, or if EPA has notified Settling Parties that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such documents or information without further notice to Settling Parties.

b. Settling Parties may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege in lieu of providing records, they shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged portion only. Settling Parties shall retain all records that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Parties’ favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

___. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]

[__]. RETENTION OF RECORDS]¹¹

[__]. Until __ years after the effective date of this Agreement, each Settling Party shall preserve and retain all [records] [if Access to Information Section is not used, insert “records, reports, or information (hereinafter referred to as “records”)] now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at

¹¹ See n.10 *supra*.

the Site or to the liability of any person for response actions or response costs at or in connection with the Site, regardless of any corporate retention policy to the contrary.

____. After the conclusion of the document retention period in the preceding paragraph, Settling Parties shall notify EPA at least 90 days prior to the destruction of any such record, and, upon request by EPA, Settling Parties shall deliver such records to EPA. Settling Parties may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Parties assert such a privilege, they shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged portion only. Settling Parties shall retain all records that they claim to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in the Settling Parties' favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.]

XIII. CERTIFICATION

28. Each Settling Party hereby certifies individually that, to the best of its knowledge and belief, after thorough inquiry, it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site, since notification of potential liability by the United States or the State or the filing of a suit against it regarding the Site and that it has fully complied with any and all EPA requests for information regarding the Site pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.

[If Settling Federal Agencies, insert, “ _____. The United States acknowledges that each Settling Federal Agency (1) is subject to all applicable Federal record retention laws, regulations, and policies; and (2) has fully complied with any and all EPA [and State] requests for information pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), and Section 3007 of RCRA, 42 U.S.C. § 6927.”¹²]

XIV. NOTICES AND SUBMISSIONS

29. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to

¹² EPA attorneys must assure that the Agency has received a written response to any Information Requests that it has sent to Settling Federal Agencies containing a certification substantially similar to that required from private PRPs. *See* Paragraph 28.

the other Parties in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA, Settling Parties[, and Settling Federal Agencies].

As to EPA:

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

[As to Settling Federal Agencies:]

As to Settling Parties:

[Insert name and address of one person who will serve as the contact for all Settling Parties]

XV. INTEGRATION[/APPENDICES]

30. This Agreement [and its appendices] constitute[s] the final, complete and exclusive Agreement and understanding among the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Agreement. [The following appendices are attached to and incorporated into this Agreement: "Appendix A is _____; etc."]

XVI. PUBLIC COMMENT

31. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, the United States may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

XVII. EFFECTIVE DATE

32. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 31 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Agreement.

IT IS SO AGREED:

[Settling Parties]

By: _____
[Name]

[Date]

U.S. Environmental Protection Agency

By: _____
[Name]

[Date]

U.S. Department of Justice

By: _____
[Name]

[Date]

[Insert title of appropriate DOJ official]
Environment and Natural Resources Division
U.S. Department of Justice
Washington, D.C. 20530

By: _____
[Name]

[Date]

Attorney
U.S. Department of Justice
Environmental Enforcement Section
Environment and Natural Resources Division
P.O. Box 7611
Washington, DC 20044-7611

[If Settling Federal Agencies, insert]

By: _____
[Name]

[Date]

Environmental Defense Section
Environment and Natural Resources Division
U.S. Department of Justice
P.O. Box 23986
Washington, D.C. 20026-3986

APPENDIX

OPTIONAL PAYMENT OF ADDITIONAL RESPONSE COSTS PROVISION

Insert the following definition in Section IV:

[___. “Additional Response Costs” shall mean all costs, including but not limited to direct and indirect costs, that EPA or the U.S. Department of Justice on behalf of EPA [or any other person]¹³ incurs and pays at or in connection with the Site, to the extent such costs exceed \$ ____ [insert total response cost estimate upon which Settling Parties’ payment is based.]]”]

Insert the following two paragraphs at the end of Section VI:

[13.3. Payment of Additional Response Costs.]

a. Settling Parties shall pay to the EPA Hazardous Substance Superfund [__%] [if Settling Federal Agencies, after % is specified for Settling Parties, insert “, and the United States on behalf of Settling Federal Agencies shall pay __%] of Additional Response Costs not inconsistent with the National Contingency Plan. If Additional Response Costs are incurred, EPA will send Settling Parties [and Settling Federal Agencies] one or more bills requiring payment [of the specified percentage], which includes a [name standard Regionally-prepared cost summary, which includes direct and indirect costs incurred by EPA and its contractors; also insert name of DOJ-prepared cost summary which would reflect any costs incurred by DOJ and its contractors]. Settling Parties shall make all payments within 30 days of receipt of each bill requiring payment, except as otherwise provided in Paragraph 13.4 (Resolution of Disputes Concerning Payment of Additional Response Costs). Payment [if Settling Federal Agencies, insert, “by Settling Parties”] shall be made by certified check or checks or cashier’s check or checks made payable to "EPA Hazardous Substance Superfund," referencing the name and address of the party making payment, the EPA Region and Site Spill ID Number _____, and the EPA Docket number for this action. Settling Parties shall send the check[s] to:

EPA-Superfund

[Insert appropriate Regional Superfund lockbox number and address]

b. At the time of payment, Settling Parties shall also send notice that payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID # _____ and the EPA docket number for this action.

¹³ If the Agreement concerns an enforcement-lead site at which PRPs may be performing the Additional Response Action, include “or any other person” in this definition.

c. The total amount to be paid by Settling Parties pursuant to Paragraph 13.3(a) (Payment of Additional Response Costs) shall be deposited by EPA in the [Site name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund. **[If part or all of the payment will be deposited in the EPA Hazardous Substance Superfund, rather than in a special account, insert appropriate language from the Note following Paragraph 13.0 of the model.]**¹⁴

[If Settling Federal Agencies, insert the following Subparagraph.] [d.] [The United States, on behalf of Settling Federal Agencies, shall make all Additional Response Cost payments as soon as reasonably practicable after receipt of each bill requiring payment, in the manner provided and consistent with Paragraph 13.1(a) above and subject to the limitations in Paragraph 13.2 above. In the event that an Additional Response Costs payment is not made by Settling Federal Agencies within 30 days of receipt of any bill, Interest on the unpaid balance shall be paid at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), commencing on the date of the bill and accruing through the date of the payment. Provided, that in the event any such Additional Response Costs are disputed by Settling Parties in accordance with Paragraph 13.4, below, the United States shall pay only that portion of the payment required under this Subparagraph (d) that is attributable to the costs that are undisputed by Settling Parties. The remaining portion of the amounts payable under this Subparagraph (d) that are attributable to disputed costs as to which the United States prevails pursuant to Paragraph 13.4, shall be paid as soon as reasonably practicable after the dispute is resolved, and any such delayed payment shall include Interest as provided in this Subparagraph (d) from the date of the original bill through the date of payment.]

13.4. Resolution of Disputes with Settling Parties Concerning Payment of Additional Response Costs.

[NOTE: Consider whether any ADR options should be included here.]

a. Use of Dispute Resolution. The dispute resolution procedures set forth in this Paragraph shall be the exclusive mechanism for resolving disputes regarding Settling Parties' obligation to reimburse EPA for Additional Response Costs. The dispute resolution procedures in this Paragraph are limited to disputes regarding recovery of Additional Response Costs. Nothing in this Paragraph shall be deemed to create a right to pre-enforcement review of response actions taken by EPA.

¹⁴ If PRPs perform the additional response action at the Site pursuant to a settlement with the EPA, and Additional Response Costs are defined to include these PRP-incurred costs, it may be appropriate for some or all of these Additional Response Costs to be paid directly to the performing PRPs' trust fund or escrow account established pursuant to the work settlement.

b. Settling Parties may dispute all or part of a bill for Additional Response Costs submitted under this Agreement if Settling Parties allege that EPA has made an accounting error, or if Settling Parties allege that a cost item is inconsistent with the NCP. If any dispute over costs is resolved before payment is due, the amount due will be adjusted as necessary. If the dispute is not resolved before payment is due, Settling Parties shall pay the full amount of the uncontested costs to EPA as specified in Paragraph 13.3 on or before the due date. Within the same time period, Settling Parties shall pay the full amount of the contested costs into an interest-bearing escrow account. Settling Parties shall simultaneously transmit a copy of both checks to the persons listed in Paragraph 13.3(b) above. Settling Parties shall ensure that the prevailing party or parties in the dispute shall receive the amount upon which they prevailed from the escrow funds plus interest within __ days after the dispute is resolved.

[NOTE: The Regions should develop a record for the dispute and its resolution.]

c. If Settling Parties object to any billing for Additional Response Costs, they shall notify EPA in writing of their objection(s) within __ days of such action, unless the objection(s) has/have been resolved informally. EPA and Settling Parties shall have __ days from EPA's receipt of Settling Parties' written objection(s) to resolve the dispute through formal negotiations (the "Negotiation Period"). The Negotiation Period may be extended at the sole discretion of EPA.

d. Any agreement reached by the parties pursuant to this Section shall be in writing and shall, upon signature by both parties, be incorporated into and become an enforceable part of this Agreement. If the Parties are unable to reach an agreement within the Negotiation Period, an EPA management official at the [insert Region-specific] level or higher will issue a written decision on the dispute to Settling Parties, which shall not constitute final agency action for purposes of judicial review. EPA's decision shall be incorporated into and become an enforceable part of this Agreement. Following resolution of the dispute, as provided by this Section, Settling Parties shall make payment in accordance with the agreement reached or with EPA's decision, whichever occurs, and Paragraph 13.4(b) above.]

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AND UNITED
STATES DEPARTMENT OF JUSTICE REVISED MODEL CERCLA SECTION
122(h)(1) CASHOUT AGREEMENT FOR ABILITY TO PAY PERIPHERAL PARTIES**

January 8, 2004

[NOTE: This revised model supersedes the “Model CERCLA Section 122(h)(1) Cashout Agreement for Ability to Pay Peripheral Parties” that was issued as Appendix B to the September 30, 1998 “Guidance on Administrative Response Cost Settlements under Section 122(h) of CERCLA and Administrative Cashout Settlements with Peripheral Parties under Section 122(h) of CERCLA and Attorney General Authority.”]

This model and any internal procedures adopted for its implementation and use are intended as guidance for employees of the U.S. Environmental Protection Agency and U.S. Department of Justice. They are not rules and do not create legal obligations. The extent to which EPA uses them in a particular case will depend on the facts of the case.

**REVISED MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT
FOR ABILITY TO PAY PERIPHERAL PARTIES**

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**REVISED MODEL CERCLA SECTION 122(h)(1) CASHOUT AGREEMENT
FOR ABILITY TO PAY PERIPHERAL PARTIES**

IN THE MATTER OF:	)	AGREEMENT
)	
Site Name]	)	U.S. EPA Region ____
[City, County, State]	)	CERCLA Docket No. ____
)	
[Name of Settling Party]	)	PROCEEDING UNDER SECTION
SETTLING PARTY	)	122(h)(1) OF CERCLA
_____	)	42 U.S.C. § 9622(h)(1)

I. JURISDICTION

1. This Agreement is entered into pursuant to the authority vested in the Administrator of the U.S. Environmental Protection Agency (“EPA”) by Section 122(h)(1) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (“CERCLA”), 42 U.S.C. § 9622(h)(1), which authority has been delegated to the Regional Administrators of the EPA by EPA Delegation No. 14-14-D [insert reference to any internal Regional redelegation]. This Agreement is also entered into pursuant to the authority of the Attorney General of the United States to compromise and settle claims of the United States, which authority, in the circumstances of this settlement, has been delegated to [check with DOJ contact to determine appropriate DOJ official].

2. This Agreement is made and entered into by EPA and [insert name] (“Settling Party”). Settling Party consents to and will not contest the authority of the United States to enter into this Agreement or to implement or enforce its terms.

II. BACKGROUND

3. This Agreement concerns the [insert Site name] (“Site”) located in [insert Site location]. EPA alleges that the Site is a facility as defined by Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

4. In response to the release or threatened release of hazardous substances at or from the Site, EPA undertook response actions at the Site pursuant to Section 104 of CERCLA, 42 U.S.C. § 9604, and [will/may] undertake additional response actions in the future. **[NOTE: A brief description of the release or threatened release and of the response actions taken or to be taken by EPA or potentially responsible parties may be included.]**

5. In performing response action at the Site, EPA has incurred response costs and will incur additional response costs in the future.

6. EPA alleges that Settling Party is a responsible party pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is jointly and severally liable for response costs incurred and to be incurred at the Site.

7. EPA has reviewed the Financial Information submitted by Settling Party to determine whether Settling Party is financially able to pay response costs incurred and to be incurred at the Site. Based upon this Financial Information, EPA has determined that Settling Party has limited financial ability to pay for response costs incurred and to be incurred at the Site.

8. EPA and Settling Party recognize that this Agreement has been negotiated in good faith and that this Agreement is entered into without the admission or adjudication of any issue of fact or law. The actions undertaken by Settling Party in accordance with this Agreement do not constitute an admission of any liability. Settling Party does not admit, and retains the right to controvert in any subsequent proceedings other than proceedings to implement or enforce this Agreement, the validity of the facts or allegations contained in this Section.

III. PARTIES BOUND

9. This Agreement shall be binding upon EPA and upon Settling Party and its [heirs,] successors and assigns. Any change in ownership or corporate or other legal status of Settling Party, including but not limited to any transfer of assets or real or personal property, shall in no way alter Settling Party's responsibilities under this Agreement. Each signatory to this Agreement certifies that he or she is authorized to enter into the terms and conditions of this Agreement and to bind legally the party represented by him or her.

IV. STATEMENT OF PURPOSE

10. By entering into this Agreement, the mutual objective of the Parties is to avoid difficult and prolonged litigation by allowing Settling Party to make a cash payment to address its alleged civil liability for the Site as provided in the Covenant Not to Sue by EPA in Section VIII, subject to the Reservations of Rights by EPA in Section IX.

V. DEFINITIONS

11. Unless otherwise expressly provided herein, terms used in this Agreement which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Agreement or in any appendix attached hereto, the following definitions shall apply:

a. “Agreement” shall mean this Agreement and any attached appendices. In the event of conflict between this Agreement and any appendix, the Agreement shall control.

b. “CERCLA” shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. § 9601, *et seq.*

c. “Day” shall mean a calendar day. In computing any period of time under this Agreement, where the last day would fall on a Saturday, Sunday, or federal holiday, the period shall run until the close of business of the next working day.

d. “EPA” shall mean the United States Environmental Protection Agency and any successor departments, agencies, or instrumentalities of the United States.

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used.]

____. “Fair Market Value” shall, except in the event of a foreclosure or transfer by deed or other assignment in lieu of foreclosure, mean the price at which the Property would change hands between a willing buyer and a willing seller under actual market conditions, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts. In the event of a transfer by foreclosure, “Fair Market Value” shall mean the amount obtained at the foreclosure sale. In the event of a transfer by a deed or other assignment in lieu of foreclosure, “Fair Market Value” shall mean the balance of Settling Party’s mortgage on the Property at the time of the transfer.]

e. “Financial Information” shall mean those financial documents identified in Appendix ____.

f. “Interest” shall mean interest at the rate specified for interest on investments of the Hazardous Substance Superfund established by 26 U.S.C. § 9507, compounded on October 1 of each year, in accordance with 42 U.S.C. § 9607(a). The applicable rate of interest shall be the rate in effect at the time the interest accrues. The rate of interest is subject to change on October 1 of each year.¹

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used.]

____. “Net Sales Proceeds” shall mean the total value of all consideration received by Settling Party for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) less i) the balance of Settling Party’s mortgage on the Property, ii) closing costs limited to those reasonably incurred and actually paid by Settling Party associated with the

¹ The Superfund currently is invested in 52-week MK notes. The interest rate for these MK notes changes on October 1 of each year. Current and historical rates are available online at http://www.epa.gov/budget/finstatement/superfund/int_rate.htm.

Transfer of the Property, and iii) federal and state taxes owed on the proceeds. Settling Party shall provide EPA and the State with documentation sufficient to show the total value of all consideration received by Settling Party for each Transfer (or if the consideration cannot be determined, the Fair Market Value of the Property) at the time of each Transfer, the amount of the proceeds of the Transfer, and the amounts corresponding to items i) through iii) above. This documentation shall include, but not be limited to, the report of an appraisal paid for by Settling Party, performed by an appraiser satisfactory to the Parties, upon appraisal assumptions satisfactory to the Parties. The documentation must also include, either as part of the report or separately, 1) a tax statement showing the assessed valuation of the Property for each of the three years immediately preceding the Transfer, and 2) a schedule showing all outstanding indebtedness on the Property.]

g. "Paragraph" shall mean a portion of this Agreement identified by an Arabic numeral or a lower case letter.

h. "Parties" shall mean EPA and Settling Party.

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used. Modify definition if property to be sold is not part of the Site.] [__. "Property" shall mean that portion of the Site that is owned by Settling Party as of [insert date]. The Property is located at [insert address] in [insert City, County, State], and is designated by the following property description: _____."]

i. "RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901, *et seq.* (also known as the Resource Conservation and Recovery Act).

j. "Section" shall mean a portion of this Agreement identified by a Roman numeral.

k. "Settling Party" shall mean [insert name].

l. "Site" shall mean the ____ Superfund site, encompassing approximately ____ acres, located at [insert address or description of location] in [insert City, County, State], and [insert either "generally shown on the map included in Appendix ____" or "generally designated by the following property description: _____."]

[NOTE: Insert the following definition if the optional paragraph following Paragraph 13 on payment of proceeds of transfer of the Site or other real property is used.] [__. "Transfer" shall mean each sale, assignment, transfer or exchange by Settling Party (or its successors or heirs) of the Property, or any portion thereof, or of the entity owning the Property, where title to the Property (or any portion or interest thereof) or to the entity owning the Property i) is transferred and Fair Market Value is received in consideration, or ii) is transferred involuntarily by operation of law, including foreclosure and its equivalents following default on

the indebtedness secured, in whole or in part, by the Property, including, but not limited to, a deed or other assignment in lieu of foreclosure. A Transfer does not include a transfer pursuant to an inheritance or a bequest.]

m. "United States" shall mean the United States of America, including its departments, agencies, and instrumentalities.

VI. PAYMENT OF RESPONSE COSTS

12. **[NOTE: Use this first Paragraph 12 when the Agreement requires one lump-sum payment.]** Within 30 days after the effective date of this Agreement as defined by Paragraph 32, Settling Party shall pay to the EPA Hazardous Substance Superfund \$ _____ [, plus an additional sum for Interest on that amount calculated from [insert date, *e.g.*, date of last cost summary] through the date of payment]. **[NOTE: The following language should be used if the payment amount is above \$25,000. Regional attorneys should consult with the Comptroller's Office in the Region to determine if more specific EFT instructions should be included.]** Payment shall be made by Electronic Funds Transfer ("EFT") in accordance with current EFT procedures to be provided to Settling Party by EPA Region __, and shall be accompanied by a statement identifying the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action. **[NOTE: The following language may be used if the payment amount is below \$25,000.]** Payment shall be made by certified or cashier's check made payable to "EPA Hazardous Substance Superfund." The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

At the time of payment, Settling Party shall also send notice that payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID # _____ and the EPA docket number for this action.

12. **[NOTE: This alternative Paragraph 12 may be used when the Agreement includes an installment payment plan. The Regional attorney should discuss all proposed installment payment plans with the Regional Financial Management Office, including the minimum payment that may be processed, the minimum length of time between payments, the maximum length of the payment schedule, and the calculation of interest. When drafting an installment payment plan, keep in mind that Interest is a defined term.]** Settling Party shall pay to the EPA Hazardous Substance Superfund the principal sum of \$ _____, plus an additional sum for Interest as explained below. Payment shall be made in [insert number and, if applicable, insert, *e.g.*, quarterly, yearly] installments. Each installment, except for the first, on which no interest shall be due, shall include the principal amount due plus an additional sum for accrued Interest on the declining principal balance calculated from the effective date of

this Agreement as defined in Paragraph 32. The first payment of \$_____ shall be due within 30 days of the effective date of this Agreement. Subsequent payments of \$_____ shall be due on [insert due dates for all subsequent payments or, *e.g.*, “January 1 of each year thereafter until all payments have been made.”] Settling Party may accelerate these payments, and Interest due on the accelerated payments shall be reduced accordingly.

[NOTE: The following language should be used if each payment is above \$25,000.]

Payment shall be made by Electronic Funds Transfer (“EFT”) in accordance with instructions to be provided to Settling Party by EPA Region __, and shall be accompanied by a statement identifying the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action.

[NOTE: The following language may be used if each payment is below \$25,000.] Payment shall be made by certified or cashier's check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

At the time of each payment, Settling Party shall also send notice that such payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall reference the EPA Region and Site/Spill ID # _____ and the EPA docket number for this action.

13. The total amount to be paid by Settling Party pursuant to Paragraph 12 shall be deposited by EPA in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.

[NOTE ON SPECIAL ACCOUNTS: Payments made under either Paragraph 12 may be deposited in the Hazardous Substance Superfund or may be deposited in a site-specific special account within the Hazardous Substance Superfund (more accurately referred to as a “reimbursable account”).² The Agreement should include clear instructions indicating which portion of the payment is to be deposited in the Hazardous Substance Superfund and which portion of the payment is to be retained in a special account. Under Paragraph 12 as written, 100% of the payment will be deposited in a special account. The following

² When PRPs are performing the response action at the Site, payments may, when appropriate, be directed to PRP-managed trust funds or escrow accounts established pursuant to settlements with EPA rather than to an EPA special account.

language may be substituted if all or part of the payment will be deposited in the EPA Hazardous Substance Superfund.]

[If the entire payment will be deposited by EPA in the EPA Hazardous Substance Superfund:]

“The total amount to be paid by Settling Party pursuant to Paragraph 12 shall be deposited by EPA in the EPA Hazardous Substance Superfund.”

[If the payment will be split between the EPA Hazardous Substance Superfund and a special account:]

“Of the total amount to be paid by Settling Party pursuant to Paragraph 12, [‘\$____’ or ‘____%’] shall be deposited by EPA in the EPA Hazardous Substance Superfund], and [‘\$____’ or ‘____%’] shall be deposited by EPA in the [Insert Site Name] Special Account within the EPA Hazardous Substance Superfund to be retained and used to conduct or finance response actions at or in connection with the Site, or to be transferred by EPA to the EPA Hazardous Substance Superfund.”

[NOTE: If Settling Party has a claim relating to the Site for contractual indemnification, the negotiating team should consider whether a provision should be included under which EPA receives a percentage or a fixed amount of any potential recovery. The negotiating team should also request and review copies of any applicable insurance policies and consult with Headquarters about possible approaches for recovery under such policies.]

[NOTE: The following optional paragraph may be included when appropriate if the Settling Party is the Site owner. It may also be used when appropriate for recovery of proceeds from the sale of real property which is not part of the Site.] [____. Payment of Proceeds of Sale of Property. Settling Party agrees that it will not sell, assign, transfer or exchange the Property except by means of a Transfer. **[NOTE: If Settling Party is obligated to attempt to sell the Property as a condition of this Agreement insert, “Settling Party shall use its best efforts to Transfer the Property within ____ [days/months] of the effective date of this Agreement.”]**

a. In addition to the payment[s] made under Paragraph 12 [insert reference to any other payment provisions], Settling Party shall pay to EPA ____% [if potential recovery may exceed total amount sought from Settling Party, insert “or \$____, whichever is lesser,”] of the Net Sales Proceeds of the Transfer of the Property. Payment shall be made within ____ [e.g., 15] days of the effective date of the Transfer of the Property.

b. Payment shall be made by certified or cashier’s check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # _____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

Settling Party shall send notice that payment has been made in accordance with Paragraph 12 above, and the payment shall be deposited by EPA in accordance with Paragraph 13 above.

[NOTE: If the deposit instructions in Paragraph 13 do not apply to this payment, included alternative instructions here.]

c. At least 30 days prior to any such Transfer, Settling Party shall notify EPA of the proposed Transfer, which notice shall include a description of the property to be sold, the identity of the purchaser, the terms of the Transfer, the consideration to be paid, and a copy of the Transfer agreement. The proposed sales price must be at least equal to the Fair Market Value of the Property based upon an appraisal obtained within 1 year of the Transfer. Settling Party shall notify EPA of the completion of the Transfer within 10 days of the date of closing and shall include with such notification a copy of the closing binder, including final executed documentation for the conveyance and a work sheet setting forth the Net Sales Proceeds and the amount payable to EPA.

d. In the event of a Transfer of the Property or any portion thereof, Settling Party shall continue to be bound by all the terms and conditions, and subject to all the benefits, of this Agreement, except if EPA and Settling Party modify this Agreement in writing.] **[NOTE: If Settling Party is not obligated to attempt to sell the Property as a condition of this Agreement insert, "Nothing in this Paragraph obligates Settling Party to Transfer the Property or any portion thereof."]**

[NOTE: If financial circumstances exist that would justify inclusion of additional conditional payments, such as payment of a percentage of future earnings or a percentage of the proceeds of a future sale of assets other than the Site or other real property, such a provision may be included here.]

VII. FAILURE TO COMPLY WITH AGREEMENT

14. **[NOTE: Use this Paragraph 14 when the Agreement requires one lump-sum payment.]** Interest on Late Payments. If Settling Party fails to make any payment required by Paragraph 12 [also reference any other payment provisions] by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment.

14. **[NOTE: Use this alternative Paragraph 14 when the Agreement includes an installment payment plan.]** If Settling Party fails to make any payment required by Paragraph 12 by the required due date, all remaining installment payments and all accrued Interest shall become due immediately upon such failure. Interest shall continue to accrue on any unpaid amounts until the total amount due has been received. [If other payment provisions are included, insert, "If Settling Party fails to make any payment under Paragraph(s) __ by the required due date, Interest shall continue to accrue on the unpaid balance through the date of payment."]

15. Stipulated Penalty.

a. If any amounts due under Paragraph 12 [also reference any other payment provisions] are not paid by the required date, Settling Party shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, in addition to the Interest required by Paragraph 14, \$ ____ per violation per day that such payment is late.

[NOTE: If the Agreement includes any non-payment obligations for which a stipulated penalty is due, insert, “If Settling Party does not comply with [reference sections containing non-payment obligations], Settling Party shall be in violation of this Agreement and shall pay to EPA, as a stipulated penalty, \$ ____ per violation per day of such noncompliance.” Escalating penalty payment schedules may be used for payment or non-payment obligations.]

b. Stipulated penalties are due and payable within 30 days of the date of demand for payment of the penalties by EPA. All payments to EPA under this Paragraph shall be identified as “stipulated penalties” and shall be made by certified or cashier's check made payable to “EPA Hazardous Substance Superfund.” The check, or a letter accompanying the check, shall reference the name and address of Settling Party, the Site name, the EPA Region and Site/Spill ID # ____, and the EPA docket number for this action, and shall be sent to:

EPA Superfund

[Insert Regional Superfund lockbox number and address]

c. At the time of each payment, Settling Party shall send notice that such payment has been made to EPA in accordance with Section XIV (Notices and Submissions). Such notice shall identify the Region and Site-Spill ID # ____ and the EPA Docket Number for this action.

d. Penalties shall accrue as provided above regardless of whether EPA has notified Settling Party of the violation or made a demand for payment, but need only be paid upon demand. All penalties shall begin to accrue on the day after payment [if non-payment obligations are included, insert “or performance”] is due [if non-payment obligations are included, insert “, or the day a violation occurs,”] and shall continue to accrue through the date of payment [if non-payment obligations are included, insert, “or the final day of correction of the noncompliance or completion of the activity.”] Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Agreement.

16. In addition to the Interest and Stipulated Penalty payments required by this Section and any other remedies or sanctions available to the United States by virtue of Settling Party's failure to comply with the requirements of this Agreement, if Settling Party fails or refuses to comply with any term or condition of this Agreement, it shall be subject to enforcement action pursuant to Section 122(h)(3) of CERCLA, 42 U.S.C. § 9622(h)(3). If the United States brings an action to enforce this Agreement, Settling Party shall reimburse the United States for all costs of such action, including but not limited to costs of attorney time.

17. Notwithstanding any other provision of this Section, EPA may, in its unreviewable discretion, waive payment of any portion of the stipulated penalties that have accrued pursuant to this Agreement. Settling Party's payment of stipulated penalties shall not excuse Settling Party from payment as required by Paragraph 12 [also reference any other payment provisions] or from performance of any other requirements of this Agreement.

[NOTE: If Settling Party is a Site owner, insert the following Section.]

[____. RELEASE OF NOTICE OF FEDERAL LIEN]

[___. Within __ days after EPA receives [if installment payment plan insert "the final"] payment required by Paragraph 12 of this Agreement [or "within __ days after closing" if Agreement provides for sale of site or other real property], EPA shall file a Release of Notice of Federal Lien in the Recorder's Office [or Registry of Deeds or other appropriate office], _____ County, State of _____. The Release of Notice of Federal Lien shall release the Notice of Federal Lien filed on [insert date and file number of lien] and shall not release any other lien or encumbrance which may exist upon the Property.]

VIII. COVENANT NOT TO SUE BY EPA

18. Except as specifically provided in Section IX (Reservations of Rights by EPA), EPA covenants not to sue or to take administrative action against Settling Party pursuant to Sections 106 and 107(a) of CERCLA, 42 U.S.C. §§ 9606 and 9607(a), [and Section 7003 of RCRA, 42 U.S.C. § 6973,]³ with regard to the Site.⁴ With respect to present and future liability, this covenant shall take effect upon receipt by EPA of [for lump sum payments, insert "all amounts required by Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Agreement)."] [for installment payment plans, insert "the first payment required by Section VI, Paragraph 12 (Payment of Response Costs)."] This covenant not to sue is conditioned upon the satisfactory performance by Settling Party of its obligations under this Agreement[.] [for installment payment plans, continue sentence with "including but not limited to, payment of all amounts due under Section VI (Payment of Response Costs) and any amount due under Section VII (Failure to Comply with Agreement)."] This covenant not to sue is also conditioned upon the veracity and completeness of the Financial Information provided to EPA by Settling Party. If the Financial Information is subsequently determined by EPA to be false or, in any material respect, inaccurate, Settling Party shall forfeit all payments made pursuant to this Agreement and the covenant not to sue shall be null and void. Such forfeiture shall not constitute liquidated damages and shall not in any way foreclose EPA's right to pursue any other

³ Note that when a RCRA Section 7003 covenant is included, Section 7003(d) of RCRA requires EPA to provide an opportunity for a public meeting in the affected area.

⁴ This covenant assumes that EPA has decided to grant a full covenant not to sue for the Site as a whole. If a covenant of lesser scope is intended, this will need to be narrowed.

causes of action arising from Settling Party's false or materially inaccurate information. This covenant not to sue extends only to Settling Party and does not extend to any other person.

IX. RESERVATIONS OF RIGHTS BY EPA⁵

19. EPA reserves, and this Agreement is without prejudice to, all rights against Settling Party with respect to all matters not expressly included within the Covenant Not to Sue by EPA in Paragraph 18. Notwithstanding any other provision of this Agreement, EPA reserves all rights against Settling Party with respect to:

- a. liability for failure of Settling Party to meet a requirement of this Agreement;
- b. criminal liability;
- c. liability for damages for injury to, destruction of, or loss of natural resources, and for the costs of any natural resource damage assessments;

[NOTE: The precise terms of Subparagraph (d) may need to be changed if Settling Party has a continuing relationship with the Site.] d. liability, based upon Settling Party's ownership or operation of the Site, or upon Settling Party's transportation, treatment, storage, or disposal, or the arrangement for the transportation, treatment, storage, or disposal, of a hazardous substance or a solid waste at or in connection with the Site, after signature of this Agreement by Settling Party; and

- e. liability arising from the past, present, or future disposal, release or threat of release of a hazardous substance, pollutant, or contaminant outside of the Site.

20. Notwithstanding any other provision of this Agreement, EPA reserves, and this Agreement is without prejudice to, the right to reinstitute or reopen this action, or to commence a new action seeking relief other than as provided in this Agreement, if the Financial Information provided by Settling Party, or the financial certification made by Settling Party in Paragraph 30(b), is false or, in an material respect, inaccurate.

21. Nothing in this Agreement is intended to be nor shall it be construed as a release, covenant not to sue, or compromise of any claim or cause of action, administrative or judicial, civil or criminal, past or future, in law or in equity, which EPA may have against any person, firm, corporation or other entity not a signatory to this Agreement.

⁵ On a case-by-case basis, EPA and DOJ may consider using an unknown conditions reopener in an ability to pay agreement in addition to the other reservations of rights included in this Section. Because use of this reopener presents case-specific drafting issues, Regions should contact OECA when using this alternative.

X. COVENANT NOT TO SUE BY SETTLING PARTY

22. Settling Party agrees not to assert any claims or causes of action against the United States, or its contractors or employees, with respect to the Site⁶ or this Agreement, including but not limited to:

a. any direct or indirect claim for reimbursement from the EPA Hazardous Substance Superfund established by 26 U.S.C. § 9507, based on Sections 106(b)(2), 107, 111, 112, or 113 of CERCLA, 42 U.S.C. §§ 9606(b)(2), 9607, 9611, 9612, or 9613, or any other provision of law;

b. any claim arising out of response actions at or in connection with the Site, including any claim under the United States Constitution, the [State] Constitution, the Tucker Act, 28 U.S.C. § 1491, the Equal Access to Justice Act, 28 U.S.C. § 2412, as amended, or at common law; or

c. any claim against the United States pursuant to Sections 107 and 113 of CERCLA, 42 U.S.C. §§ 9607 and 9613, relating to the Site.⁷

Except as provided in Paragraph 24 (Waiver of Claims) and Paragraph 27 (Waiver of Claim-Splitting Defenses), these covenants not to sue shall not apply in the event the United States brings a cause of action or issues an order pursuant to the reservations set forth in Paragraph 19(c) - (e), but only to the extent that Settling Parties' claims arise from the same response action or response costs that the United States is seeking pursuant to the applicable reservation.

23. Nothing in this Agreement shall be deemed to constitute approval or preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. 300.700(d).

24. Settling Party agrees not to assert any claims or causes of action that it may have for all matters relating to the Site, including for contribution, against any other person [, except as provided in Paragraph ____.] **[NOTE: Use bracketed language if Agreement includes a**

⁶ If the Agreement does not cover the Site as a whole, the reference to “the Site” here and in Subparagraphs 22(b) and (c) should be narrowed to conform to the intended scope of the Agreement.

⁷ The settlement should release any claims by the Settling ATP Party against the United States related to the Site. Where the Region has any information suggesting federal agency liability, all information relating to potential federal liability should be provided to the affected agency and DOJ as soon as possible in order to resolve any such issues either in the ATP settlement or in a future settlement. Settlement of any federal liability in the ATP settlement will require additional revisions to this document.

provision (following Paragraph 13) on future recovery from insurance or contractual indemnification claims concerning the Site.] This waiver shall not apply with respect to any defense, claim, or cause of action that a Settling Party may have against any person if such person asserts a claim or cause of action relating to the Site against such Settling Party.

XI. EFFECT OF SETTLEMENT/CONTRIBUTION PROTECTION

25. Except as provided in Paragraph 24, nothing in this Agreement shall be construed to create any rights in, or grant any cause of action to, any person not a Party to this Agreement. EPA reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action that it may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a Party hereto.

26. The Parties agree that Settling Party is entitled, as of the effective date of this Agreement, to protection from contribution actions or claims as provided by Sections 113(f)(2) and 122(h)(4) of CERCLA, 42 U.S.C. §§ 9613(f)(2) and 9622(h)(4), for “matters addressed” in this Agreement. The “matters addressed” in this Agreement are all response actions taken or to be taken and all response costs incurred or to be incurred, at or in connection with the Site, by the United States or any other person. The “matters addressed” in this Agreement do not include those response costs or response actions as to which EPA has reserved its rights under this Agreement (except for claims for failure to comply with this Agreement), in the event that EPA asserts rights against Settling Party coming within the scope of such reservations.⁸

27. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other relief relating to the Site, Settling Party shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, *res judicata*, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been addressed in this Agreement; provided, however, that nothing in this Paragraph affects the enforceability of the Covenant Not to Sue by EPA set forth in Section VIII.

[___. SITE ACCESS]⁹

⁸ This definition of “matters addressed” assumes that this Agreement is designed to resolve fully Settling Party’s liability at the Site pursuant to Sections 106 and 107(a) of CERCLA, subject only to the reservations of rights. If the intended resolution of liability is narrower in scope, then the definition of “matters addressed” will need to be narrowed.

⁹ Include this Section if 1) access to the Site may be needed and 2) the Site owner is Settling Party or Settling Party controls access to the Site or to any other property to which access is needed. If Settling Party will need to provide institutional controls as part of a response action, include such a provision here. Model language may be found in Section IX of the

(continued...)

[__]. Commencing upon the effective date of this Agreement, Settling Party agrees to provide EPA and its representatives and contractors access at all reasonable times to the Site and to any other property owned or controlled by Settling Party to which access is determined by EPA to be required for the implementation of this Agreement, or for the purpose of conducting any response activity related to the Site, including but not limited to:

- a. Monitoring, investigation, removal, remedial or other activities at the Site;
- b. Verifying any data or information submitted to EPA;
- c. Conducting investigations relating to contamination at or near the Site;
- d. Obtaining samples;
- e. Assessing the need for, planning, or implementing response actions at or near the Site; [and]
- [f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by Settling Party or its agents, consistent with Section ____ (Access to Information).]

____. Notwithstanding any provision of this Agreement, EPA retain[s] all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA, and any other applicable statutes or regulations.]

[_. ACCESS TO INFORMATION]¹⁰

[__ . Settling Party shall provide to EPA, upon request, copies of all records, reports, or information (hereinafter referred to as “records”) within its possession or control or that of its contractors or agents relating to activities at the Site [if needed, include “or to the implementation of this Agreement”], including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Site.

____ . Confidential Business Information and Privileged Documents.

⁹(...continued)
Revised Model RD/RA Consent Decree (June 12, 2001, or more recent update).

¹⁰ Include this Section only if Settling Party has been or will be involved in cleanup efforts at the Site or if Settling Party may possess information that may assist the Agency in its cleanup or enforcement efforts.

a. Settling Party may assert business confidentiality claims covering part or all of the records submitted to EPA under this Agreement to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. 2.203(b). Records determined to be confidential by EPA will be accorded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies records when they are submitted to EPA, or if EPA has notified Settling Party that the records are not confidential under the standards of Section 104(e)(7) of CERCLA or 40 C.F.R. Part 2 Subpart B, the public may be given access to such records without further notice to Settling Party.

b. Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege in lieu of providing records, it shall provide EPA with the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (*e.g.*, company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record shall be provided to EPA in redacted form to mask the privileged portion only. Settling Party shall retain all records that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.

__. No claim of confidentiality shall be made with respect to any data, including but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.]

[__. RETENTION OF RECORDS]¹¹

[__. Until __ years after the effective date of this Agreement, Settling Party shall preserve and retain all [records] [if Access to Information is not used, insert “records, reports, or information (hereinafter referred to as “records”)] now in its possession or control, or which come into its possession or control, that relate in any manner to response actions taken at the Site or to the liability of any person for response actions or response costs at or in connection with the Site, regardless of any corporate retention policy to the contrary.

__. After the conclusion of the document retention period in the preceding paragraph, Settling Party shall notify EPA at least 90 days prior to the destruction of any such records, and, upon request by EPA, Settling Party shall deliver any such records to EPA. Settling Party may assert that certain records are privileged under the attorney-client privilege or any other privilege recognized by federal law. If Settling Party asserts such a privilege, it shall provide EPA with

¹¹ See n.10 *supra*.

the following: 1) the title of the record; 2) the date of the record; 3) the name, title, affiliation (e.g., company or firm), and address of the author of the record; 4) the name and title of each addressee and recipient; 5) a description of the subject of the record; and 6) the privilege asserted. If a claim of privilege applies only to a portion of a record, the record will be provided to EPA in redacted form to mask the privileged portion only. Settling Party shall retain all records that it claims to be privileged until EPA has had a reasonable opportunity to dispute the privilege claim and any such dispute has been resolved in Settling Party's favor. However, no records created or generated pursuant to the requirements of this or any other settlement with the EPA pertaining to the Site shall be withheld on the grounds that they are privileged.]

XIII. CERTIFICATION

28. Settling Party hereby certifies that, to the best of its knowledge and belief, after thorough inquiry, it has:

a. not altered, mutilated, discarded, destroyed or otherwise disposed of any records, reports, or information relating to its potential liability regarding the Site since notification of potential liability by the United States or the state or the filing of a suit against it regarding the Site and that it has fully complied with any and all EPA requests for documents or information regarding the Site and Settling Party's financial circumstances pursuant to Sections 104(e) and 122(e) of CERCLA, 42 U.S.C. §§ 9604(e) and 9622(e), or Section 3007 of RCRA, 42 U.S.C. § 6927;

b. submitted to EPA Financial Information that fairly, accurately, and materially sets forth its financial circumstances, and that those circumstances have not materially changed between the time the Financial Information was submitted to EPA and the time Settling Party executes this Agreement; and

c. fully disclosed the existence of any insurance policies that may cover claims relating to cleanup of the Site.

XIV. NOTICES AND SUBMISSIONS

29. Whenever, under the terms of this Agreement, notice is required to be given or a document is required to be sent by one Party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other Party in writing. Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of this Agreement with respect to EPA and Settling Party.

As to EPA:

[Insert name and address of Regional Attorney or Remedial Project Manager and contact in Regional Comptroller's Office]

As to Settling Party:

[Insert name and address]

XV. INTEGRATION/APPENDICES

30. This Agreement and its appendices constitute the final, complete and exclusive agreement and understanding between the Parties with respect to the settlement embodied in this Agreement. The Parties acknowledge that there are no representations, agreements, or understandings relating to the settlement other than those expressly contained in this Agreement. The following appendices are attached to and incorporated into this Agreement:

Appendix A is a list of the financial documents submitted to EPA by Settling Party; etc.

VI. PUBLIC COMMENT

31. This Agreement shall be subject to a public comment period of not less than 30 days pursuant to Section 122(i) of CERCLA, 42 U.S.C. § 9622(i). In accordance with Section 122(i)(3) of CERCLA, the United States may modify or withdraw its consent to this Agreement if comments received disclose facts or considerations which indicate that this Agreement is inappropriate, improper, or inadequate.

XVII. EFFECTIVE DATE

32. The effective date of this Agreement shall be the date upon which EPA issues written notice that the public comment period pursuant to Paragraph 31 has closed and that comments received, if any, do not require modification of or withdrawal by the United States from this Agreement.

IT IS SO AGREED:

[Settling Party]

By: _____
[Name]

[Date]

U.S. Environmental Protection Agency

By: _____

[Name]

[Date]

U.S. Department of Justice

By: _____

[Name]

[Date]

[Insert title of appropriate DOJ official]

Environment and Natural Resources Division

U.S. Department of Justice

Washington, D.C. 20530

By: _____

[Name]

[Date]

Attorney

Environmental Enforcement Section

Environment and Natural Resources Division

U.S. Department of Justice

P.O. Box 7611

Washington, DC 20044-7611